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In the Supreme Court of the United States

OCTOBER TERM, 1988

City of Gretna, Louisiana, *et. al*,
Petitioners

versus

Citizens for a Better Gretna, *et.al*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF on Behalf of Petitioners

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MAY IT PLEASE THE COURT

Petitioners, the City of Gretna, et al., present for consideration the following supplemental brief, in conformity with Rule 35.5 and other applicable rules, and in response to the recent case of *Overton v. City of Austin*, No. 87-1805 (5th Cir., May 1, 1989), and the intervention of the Government as *amicus curiae*.

BACKGROUND

Four and a half years after *Gretna* was tried, three years after the district court issued its decision, and a year and a half after the appeals court decision,[1] another Fifth Circuit panel wrote, "A most perplexing aspect of *Thornburg* is its discussion of what constitutes evidence of legally significant racially polarized voting."[2] Why, three years after *Thornburg v. Gingles*[3], are district and appellate courts still struggling with the definition of "legally significant racial polarization"?

Gretna brings the issues that perplex the Fifth Circuit, as well as others, into sharp relief, and provides an opportunity to grant the Fifth Circuit's explicit plea for "further Supreme Court guidance."[4]

Much of the explanation for the unique status of *Gretna* is linked to the peculiar timing of the litigation and the atypical treatment of the case after trial. The City of Gretna went to trial in January of 1985 -- about a year and

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[1] *Citizens for a Better Gretna v. City of Gretna*, 636 F.Supp. 1113 (E.D.La. 1986), 834 F.2d 496 (5th Cir. 1987)

[2] *Overton v. City of Austin*, sl. op., p. 3327.

[3] Cited throughout prior briefs.

[4] Note 2, *supra*.

a half before *Thornburg* was decided. As such, the trial was held under *Zimmer-White* guidelines. The case languished under advisement for sixteen months. The district court issued its decision a few weeks before *Thornburg*, wherein this Court construed for the first time Section 2 of the Voting Rights Act of 1965, as amended in 1982.

It was readily apparent that the theory of vote dilution advanced by the lower courts in *Gretna* was at odds with the holdings of this Court in *Thornburg*. The *Gretna* theory of vote dilution was based on race-of-the-candidate-consciousness -- the notion that candidates of the black race are minority preferred candidates as a matter of law. An extra burden was placed on candidates of the white race who wanted to claim minority-preferred status. *Gretna* also expanded the scope of admissible evidence in vote dilution litigation by introducing exogenous elections -- elections held in overlapping jurisdictions and jurisdictions for other branches of government. RELIANCE ON SUCH ELECTIONS IS INCONSISTENT WITH THE FUNDAMENTAL NOTION OF FEDERALISM.[5]

The Fifth Circuit, rather than remanding *Gretna* for consideration under *Thornburg*, tried to rehabilitate the district court decision by confusing facts in North Carolina (the *Thornburg* situs) with the law as it applied to Gretna. To salvage the district court's race-conscious litmus test for minority-preferred status the 5th Circuit pointed to North Carolina and noted that all of the minority-preferred candidates in *Thornburg* were black. It advanced the theory that the Supreme Court had implicity established a color of candidate standard for evaluating election results. It dealt with the use of exogenous elections, notably absent in *Thornburg*, by arguing, that where evidence of

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[5]See petitioners' arguments at pp. 6-8 of their *Reply Brief*.

polarization is sparse, plaintiffs may search abroad for proof of polarization. On the other hand, where exogenous data did not support a contention of polarization, it could be ignored, argued the 5th Circuit, on the tenuous grounds of candidate non-viability. The pretext for this amorphous standard was flexibility. This kind of flexibility is fatally flawed by its contravention of the spirit of federalism, its lack of judicial manageability, and its variance from standards set by the Supreme Court in *Richmond v. Croson Co.*, No. 87-998, U.S. S.Ct. (January 23, 1989):

> "We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another."[6]

The Government, as *amicus curiae,* has provided no guidance. Rather, it has compounded the problem by proposing a counterfeit standard by which to measure vote dilution. It inexplicably ignores the issues presented by *Thornburg* and subjects this case to a singular, useless focus: Is there a violation of Section 2 of the Voting Rights Act where black [race] candidates supported by substantial numbers of black voters lose, because they receive almost no votes from white voters?[7] This shallow focus ignores the *Thornburg* tests by, among other things, requiring that white voters must vote for black race candidates. Under the voting rights regime advocated by the Government, those who would exacerbate racial tensions are encouraged. All one need do to bootstrap a Section 2 violation is find a candidate who pursues a deliberate policy of alienating majority voters. This puts in place a mechanism that fuels the very evils the Voting Rights Act and related legislation tries to extinguish.

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[6]Sl. op., p. 30.

[7]Govt. Brief, p. I.

ARGUMENT

Problems of Law

1. The Relevance of Candidate Race

It is indisputable that legally significant racial polarization is the linchpin of a Section 2 claim. The importance of *Thornburg* lies in its search for judically manageable standards for evaluating polarization. The key managerial concepts are incorporated in the notion that legally significant racial polarization is demonstrated by the usual loss of minority preferred candidates due to contrary majority bloc voting. Two ways of demonstrating this are bivariate ecological regression and homogeneous precinct analysis.

The problem raised in Gretna, and one still unclear from *Thornburg*, is just who is a minority preferred candidate? In the plurality's view, race of candidate has no relevance at all. Five Justices agree that a candidate's race *may* be relevant. Nowhere, however, is it suggested in *Thornburg* that candidate race is an overriding concern. There is likewise no suggestion that minority-race candidates are deemed minority-preferred on the basis of their skin color. This is only logical. After all, if minority-preferred status were simply a matter of skin color, why would the Court countenance forays into the mathematical thicket of electoral statistics? There is no suggestion in *Thornburg* that white candidates bear a special burden of proof in establishing their minority-preferred status. Yet in *Gretna* such a standard was imposed on white candidates. That is, under *Gretna* rules, even after winning the minority vote (as demonstrated by statistics) they must also establish to a court's satisfaction that they "ran on issues strongly affecting the black community and with an open,

postive and strong identification with the black community". Otherwise, "candidacies of black persons are the proper focus of inquiry concerning the extent to which elections are polarized."[8]

This passage is notable for two things: its obvious racism and its lack of judicial manageability. After all, can a court second-guess an electorate as to "issues" or as to "open, positive, and strong identification"? The answer is obvious. But the consequences of the *Gretna* rule are clear: a racially antagonistic group can confect a Section 2 violation in a non-polarized community by deliberatly alienating the majority population. This turns Section 2 into a "Candidate Protection Act."

The Government's position on this matter is disingenous. The Government grants petitioner's claim that "the Voting Rights Act is aimed at protecting minority voters rather than minority candidates."[9] But it concludes that, "Assuming that some of the white candidates in the 1977 election won with black support, that does not vitiate the fact that the black candidate lost because of racially polarized voting."[10]

This is a clear departure from the *Thornburg* standard. Legally significant racial polarization depends on the "usual" loss by minority-preferred candidates -- not the occasional or ideosyncratic loss. Basically, the Government's

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[8] *Record*, Vol. 1, p. 202. The victorious (white) candidates did have an open committment to the black community. They were endorsed by the Westside Citizen's Committee, a black endorsement group. Jones (black candidate) was not. See Govt. Brief, p.4, n.3.

[9] Govt. Brief, p. 10.

[10] *Id.*, p. 11. Bivariate ecological regression shows that Jones lost the black vote.

position is that *all* minority-preferred candidates must win, or, alternatively, that only white minority-preferred candidates can lose. This is a backdoor plea for proportional representation.

The Government unjustly faults petitioners for "offering a factual argument based upon calculations not presented to the district court that was set forth for the first time in a lengthy appendix to their brief in the court of appeals."[11] The fact is that the raw numbers upon which petitioners base their calculations are in evidence via respondents' exhibits.[12] The calculations, not necessarily relevant pre-*Thornburg*, when this case was tried, are certainly relevant now. Petitioners' and respondents' trial strategies and the district court's decision were geared to the *Zimmer-White* guidelines, which, although not obsolete, do not provide the principal framework for evaluating a vote dilution claim.[13] THIS IS THE REASON FOR REMAND.[14]

Petitioners have consistently argued that, under *Thornburg*, the ultimate questions are: (1) to what extent does a compact and cohesive minority group usually see its preferred candidates defeated by a majority bloc? (2) how badly or how well are Gretna's black *voters* (not Gretna's black *candidates*) faring under Gretna's at-large system? The Government ignores these questions. The case needs to be remanded so that its facts can be re-examined in the

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[11] Govt. Brief, p. 6.

[12] Plaintiffs' exhibits 67, 68.

[13] See *Thornburg* at 2765-2766.

[14] It is axiomatic that an appellate court can and should remand and grant accompanying appropriate relief where alleged error in the lower court was due to judicial rulings which, subsequent to trial, were rendered obsolete or were materially affected by a subsequent case (e.g. *Thornburg v. Gingles*), which, had it been known, might have changed the result reached in the lower court.

light of the legitimate issues, as *Thornburg* presents them, and as this Court might choose to refine them here.

2. Exogenous Elections

Respondents[15], the district court, and the 5th Circuit recognized that evidence of polarization based on City of Gretna elections was insufficient on its own to sustain a Section 2 claim. There was no evidence that Edwin Romaine had lost because of racial polarization. Indeed, Romaine testified that his candidacy was not needed to win the black vote. The incumbents were already receiving it.[16] Leo Jones, who ran unsuccessfully in a regular election and in a special election, was outpolled among black voters by two experienced white incumbents in the regular election and failed to win a majority of the black vote in the special election.[17]

As a result, respondents turned to a statewide and a presidential election to buttress their claims. These kinds of elections are called exogenous (generated from the outside) elections. Resort to exogenous elections is tempting but treacherous. In the case of Gretna, plaintiffs had to sweep into footnotes exogenous elections showing no polarization.

The reason resort to exogenous elections is so tempting is that there is no jurisdiction in the nation that can escape

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15 "Respondents" and "plaintiffs" are used interchangeably.

16 *Opinion*, p. 45, *Record*, Vol 1, p. 194. See also Appellants' *Original Brief* - 5th Cir., pp. 14-15. Romaine and Leo Jones were black candidates.

17 The raw data relating to these elections are contained in Plaintiffs' Ex. 67-68. The factual arguments relating to these data, as stated earlier, are relevant post-*Thornburg*, and petitioners should, on remand, be allowed to develop them.

attainder under this procedure, if one chooses the right election. For example, most American municipalities with an at-large system could be attacked on the basis of Jesse Jackson's campaigns for President. On the other hand, it is also usually possible to search electoral archives for other elections reflecting no polarization. Essentially the search is limitless, unmanageable, unscientific, and, most importantly, **inconsistent with the notion of federalism.** This is recognized in *Thornburg* and is inexplicably ignored by the Government. *Thornburg* (at 2763, 2765) places great emphasis on plaintiffs' duty to establish a casual link between a jurisdiction's political reality and the challenged mechanism or electoral practice.

The Government ignores this fundamental evidentiary standard. There is no great mystery surrounding it. It is patently based on relevance and is in keeping with the Court's attachment to an "intensely local apprasial of the design and impact of the multimember district in the light of past and present reality, political and otherwise" (2781), which appraisal is ultimately based on federalism.

Problems of Fact

1. Exogenous Elections

The Government and the court of appeals agree that "[exogenous] elections alone [cannot] prove racially polarized voting in Gretna aldermanic elections," but they may be "properly considered. . . .as additional evidence of bloc voting."[18] The Government further notes that "such elections have typically been considered in the analysis of

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[18] Govt. Brief, pp. 13-14.

racial bloc voting in Section 2 cases."[19] What the Government does not point out is that these are post-*Thornburg* cases, in which the litigants and the courts had the opportunity to view exogenous elections in the light of the methodological and legal rules adopted in *Thornburg*. Petitioners have had no such opportunity. The Government is attempting to use these cases to foreclose reconsideration in the instant case. On the contrary, they are compelling arguments in favor of remand, assuming, *arguendo*, that the Government's views have merit. This Court must determine whether exogenous elections are admissible. If it determines that they are admissible, it must, via remand, afford petitioners the opportunity to prepare and present their case accordingly, and allow the lower courts to weight these elections in the light of *Thornburg* principles. If the Court finds that exogenous elections are inadmissible, the parties must focus on Gretna aldermanic elections alone. Petitioners reiterate that the latter finding would be consistent with the intensely local standard set forth in *Thornburg* and with federalism.

2. Indigenous Elections

Bivariate ecological regression and homogeneous precenct analysis (extreme case analysis) are two complementary statistical methods used by courts for estimating differences in voting behavior between groups of voters. Courts also are becoming increasingly conscious of the limitations of these methods. (*Collins v. Norfolk*, sl. op. CA-83-526-N, 4th Cir., Feb. 1988, p. 32). As the 5th Circuit recently wrote:

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[19] *Id.*, p. 14. Citing *Solomon v. Liberty Co.*, 865 F.2d 1566 (11th Cir. 1988); *City of Carrollton Branch NAACP v. Stallings*, 829 F.2d 1547, *cert. den.*, 108 S.Ct. 1111 (1988); and *Smith v. Clinton*, 687 F.Supp. 1310 (E.D. Ark.), aff'd, 109 S.Ct. 548 (1988).

> Briefly stated, [bivariate ecological regression] premises correlations not upon facts about individual voter behavior but upon assumptions usually developed from precinct election returns. Estimating the ethnic composition of precincts, the analyst then *assumes* that the voters in most precincts voted according to their ethnicity. The piling on of assumptions may easily fall pray to more sophisticated statistical errors. (*Overton v. Austin*, sl. op. No. 87-1805, 5th Cir., May 1989, p. 3328).

Homogeneous precinct analysis is impossible in Gretna. There are homogeneous white precincts, but no homogeneous black precincts. This is an obvious problem, because:

> Homogeneous precinct analysis is straightforward and easy to understand. The analyst isolates two groups of "homogeneous" precincts: those in which almost all potential voters are black and those in which proportionately few are black. Precincts are considered to be homogeneous if over 90 percent of the population, voting age population, or registered voters (depending on which data are available) residing in the precinct are members of the minority group; or conversely, less than 10 percent are members of the minority group.[20]

Gretna, with no homogeneous black precincts, is unsuitable for this mode of statistical analysis. The Government is aware of this fact; its own brief states, "Gretna has

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[20] Engstrom and McDonald, "Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting," 17 *Urban Lawyer* 3 (1985), 371.

no homogeneous precincts." Yet it believes that "an extreme cases analysis corroborated the regression analysis."[21]

The Government's misconstruction of homogeneous precinct analysis exposes a lack of methodological sophistication that sets the stage for egregious errors in interpreting the somewhat more complicated issue of "bivariate ecological regression." The technique is explained in intermediate level statistics texts.[22] It has a formula that requires nothing more than the mechanical entry of data and subsequent computation. It results in estimates of white and black pluralities for a candidate of interest. Plaintiffs' experts used an *ad-hoc* formula of their own confection to inflate the degree of polarization. The Government should not have placed such blind faith in plaintiffs' ideosyncratic and unscientific methodology. Courts are already aware of the great opportunity for self-serving mathematical chicanery with bivariate ecological regression. Many of the problems have been outlined by petitioners' expert, whose work in this area has been favorably cited by the 5th Circuit in *Overton v. Austin* at p. 3328, sl. op.

It also bears pointing out that the use of regression statistics, harnessed to an undue fixation on candidate race, creates a multivariate context by making candidate race a factor in vote dilution studies. Multivariate analysis is clearly antithetical to the methodology sanctioned by *Thornburg*. It is nothing more than a mathematical version of the discredited "intent" standard, and a tool to introduce proportional representation for its own sake.

The fact is that Gretna's political geography makes

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[21] Govt. Brief, p. 5, n. 4.

it an unlikely place to conduct successful statistical forays using ecological methods. Plaintiffs' experts had to engage in what even the Government recognizes as a hazardous and unreliable practice: linear extrapolation.[23] Linear extrapolation is frowned upon by the scientific literature, as petitioners have repeatedly warned. The Government is aware that extrapolation is a problem, but thinks it creates a difficulty only when petitioners extrapolate.[24] This is far from the case.

Petitioners, using standard rather than *ad-hoc* statistical methodology,[25] have demonstrated that minority-preferred candidates do not usually lose in Gretna aldermanic elections. It is only through the selective exclusion (white candidates) and inclusion (exogenous elections) of evidence that the Government can make out a case for racial polarization. Unmasked, the basis for this evidence-shopping emerges as artificial and unrelated to the Voting Rights Act. Instead, it serves the agenda of a fictitious "Minority Candidate Set-Aside Act," an illicit entitlement program.

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[22] Langbein & Lichtman, *Ecological Inference*, p. 53.

[23] Govt. Brief, p. 11, n. 8.

[24] *Id.* The Government is convinced that extrapolation is unreliable in instances of low correlation (i.e. instances of non-polarization). It cites Blalock's *Social Statistics* as an authority. Blalock is an authority, but the Government misconstrues his point. Problems with extrapolation are not dependent on correlation (r). They arise because the nature (shape) of the relationship may change outside of the range of available data. The Government cites the wrong passage. The relevant argument is developed in Blalock, *Social Statistics* (Rev. 2d ed. 1979) at 402-403. The danger of applying extrapolation in vote dilution cases is addressed in Wildgen, "Adding *Thornburg* To The Thicket," 20 *Uban Lawyer* 155.

[25] No court has challenged petitioners' methodology.

CONCLUSION

Petitioners reiterate that *this is not just another voting rights dispute that can be disposed of via Rule 52(a).*

The Government has compounded the errors of the lower courts by failing to address the appropriate issues. It inexplicably ignores the 5th Circuit's plea in *Overton v. Austin* for further guidance, and it fails to acknowledge that *Gretna* affords this Court the opportunity to refine *Thornburg* and thus create a judicially manageable standard of review for vote dilution cases, consistent with the fundamental concept of federalism and Articles I, II, and III of the Constitution, which are violated if (1) an intent standard is imposed to judge the motives of white candidates; (2) a race-of-the-candidate litmus test is used to determine preferred candidate status; or (3) exogenous elections are examined to seek evidence of legally significant racial polarization.

Petitioners reiterate their request for certiorari and move this Court to grant their petition for those reasons herein and previosly set forth.

Respectfully submitted,

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